No. 246

In the

Supreme Court of the United States

OCTOBER TERM, 1949

ROY CREEL, *et al.*,

Petitioners,

v.

LONE STAR DEFENSE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

Comes now Roy Creel, et al., hereinafter styled petitioner, and applying for writ of certiorari to the United States Court of Appeals, Fifth Circuit, respectfully shows:

STATEMENT OF FACTS

Petitioners filed their complaint for overtime compensation, penalties and attorney's fees due them under the Fair Labor Standards Act *(29 U. S. C. A. 201)* from the Lone Star Defense Corporation. The Lone Star Defense Corporation first constructed the plant and thereafter operated it under "cost-plus-a-fixed-fee" contract, and it was the involved facility wherein your petitioners were engaged.

A motion for summary judgment was filed by respondent which in substance states that the Government owned

title to the plant's facilities in question and to the raw materials shipped into Texas to the respondent, and also title to the finished products which were afterwards shipped out of Texas; and that such products were munitions of war used for the prosecution of the war.

Such motion for summary judgment was sustained by letter of Judge Randolph Bryant, United States District Judge for the Eastern District of Texas (R. 93) wherein Judge Bryant, quoting from an opinion of Judge Lemley of the Western District of Arkansas, held:

> "The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence, the United States, in our opinion, was the ultimate consumer thereof within the meaning of the Act and the plaintiff was not engaged in the 'production of goods for commerce'."

and Judge Bryant further held that in performing the functions as were performed the United States was not engaged in commerce or the production of goods for commerce, but was simply performing an administrative act.

The contract, pursuant to which the respondent constructed and operated the plant under a "cost-plus-a-fixed-fee" contract, contemplated compliance by respondent with various federal and state regulatory statutes applicable to private employers. (Original Exhibit "A", Motion for Summary Judgment.)

The goods and raw materials shipped to respondent from numerous states into the State of Texas were transported and shipped in interstate commerce. The war munitions

and instruments of war produced at the plant of respondent were transported and shipped in interstate commerce.

The Fifth Court of Appeals held:

(1) The petitioners were not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act;

(2) The respondent was not an independent contractor;

(3) Your petitioners were not actually employees of the defendant;

(4) The respondent was acting as an agency of the United States Government;

(5) The United States Government was the producer and ultimate consumer of the goods;

(6) The respondent was exempt from the operation of the Fair Labor Standards Act, under the facts of this cause.

JURISDICTION

The jurisdiction of this court is invoked under Title 28, U. S. C. A. 347 (a) and (b). The above said opinion of the Fifth Court of Appeals having been handed down on the 18th day of January, 1949, and the petition for rehearing having been denied on the 7th day of February, 1949, the following special and important questions are presented:

QUESTIONS PRESENTED

1. Whether a "cost-plus-a-fixed-fee" contractor with the Government manufacturing goods under such contract, the raw materials of which are shipped to such contractor from without a state and the ultimate products manufactured are shipped without the state, is engaged in

"commerce" within the meaning of the Fair Labor Standards Act.

2. Whether a "cost-plus-a-fixed-fee" contractor with the Government, a private corporation, wherein the Government is the owner of the raw materials shipped to such contractor from without the state, and the Government is the owner of the finished products shipped without the state, is a governmental agency exempt from the operation of the Fair Labor Standards Act.

3. Whether the respondent is engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

4. Whether the United States Government, owning plant facilities, raw materials prior to processing and after processing, which materials were processed by a "cost-plus-a-fixed-fee" contractor with the Government and subsequently shipped without the state for use in the prosecution of the war, is a producer and the ultimate consumer of such goods within the meaning of the Fair Labor Standards Act.

5. Whether the United States Government is the employer and is exempt from the operation of the Fair Labor Standards Act under the facts of this case.

6. Whether your petitioners were actually employees of the respondent.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The issues presented in this cause are of special and outstanding importance for the reason that the products

involved herein were produced by a "cost-plus-a-fixed-fee" contractor under similar conditions to goods produced by many other "cost-plus-a-fixed-fee" contractors involving many necessary items and products transported in commerce essential to the prosecution of the war, and which production of similar goods has been uniformly held subject to the Fair Labor Standards Act. There are many litigants involved in other cases urging similar claims against "cost-plus-a-fixed-fee" contractors.

2. The decision of the Fifth Circuit Court which respondent seeks this court to review is contrary to the decision of the Seventh Circuit in *Bell v. Porter, 159 F. (2d) 117*, wherein the Seventh Circuit specifically held that munitions produced and transported in commerce under similar facts were "goods" within the meaning of the Fair Labor Standards Act and specifically held that employees engaged in the production and transportation of such goods effected by the Government were not exempt from the operation of the Fair Labor Standards Act.

3. The opinion of the Court of Appeals for the Fifth Circuit below is in conflict with the decisions of this Honorable Court in holding that a "cost-plus-a-fixed-fee" contractor is a mere agency of the United States Government. *Alabama v. King & Boozer, 310 U. S. 1; Buckstaff v. McKinley, 308 U. S. 358; Curry v. United States, 314 U. S. 14; Penn Dairies v. Milk Control Commission, 318 U. S. 361.*

4. Your petitioners were entitled to the benefits of the Fair Labor Standards Act while working for the "cost-plus-a-fixed-fee" contractor, respondent.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case No. 12,182, entitled on its docket Roy Creel, et al., Appellants v. Lone Star Defense Corporation, Appellee, and that said judgment of said Court of Appeals for the Fifth Circuit be reversed by this Honorable Court, and that your petitioners have such other and further relief as the court may deem proper.

Respectfully submitted,

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7

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SUPPORTING BRIEF

To the Honorable Supreme Court of the United States:

The opinion of the United States Court of Appeals for the Fifth Circuit appears in the transcript of the record.

Jurisdiction is invoked under Title 28, U. S. C. A., Section 47 (a) and (b). The opinion of the United States Court of Appeals for the Fifth Circuit was filed on the 18th day of January, 1949, and the petition for rehearing filed by your petitioners was overruled on February 7, 1949.

STATEMENT OF THE CASE

We herewith adopt the statement of the case as made in the foregoing petition for certiorari and do not restate the same here. We do point out that this case is similar and corollary to the *Silas Mason case* returned to the trial

court by this Honorable Court for enlargement and amplification of the record, and by reason of the fact that this Honorable Court was unable to base an opinion under the limited facts in that case. Therefore, we may expressly state that the aforesaid *Silas Mason case* is to be set for an early hearing in the Western District of Louisiana at Shreveport, wherein it is anticipated that a full and complete statement of facts will be agreed upon and adopted by counsel, and which record will be before this Court for determination in the not too distant future. Now, in the event the facts as related in the opinion of the United States Court of Appeals for the Fifth Circuit adopted below are sufficient to warrant an opinion by this Honorable Court, your petitioners herewith adopt those facts, except insofar as such facts conflict with the contention of coverage by virtue of the manufacture of munitions of war by the respondent, and insofar as such facts conflict with the allegations of your petitioners for overtime as prayed for.

ARGUMENT

1. During the last war the Government expended Forty Billion Dollars to obtain war supplies through the medium of "cost-plus-a-fixed-fee" contractors, all of which were similar to the contracts in this case. The lower courts have engaged in the disposition of some of these cases with the idea that the Fair Labor Standards Act was appropriately applicable to the employees of such "cost-plus-a-fixed-fee" contractors. Some of such courts have adopted the attitude of refusing to place the burden of the Wage and Hour Law upon the Government engaging in the production of

munitions through "cost-plus-a-fixed-fee" contractors, which munitions are calculated to be deadly and destructive as compared with other vital and necessary items of war, such as food, clothing and motor vehicles. The thinking or ideology that places "cost-plus-a-fixed-fee" contractors engaged in producing munitions upon a different basis than contractors engaged in producing food, clothing and motor vehicles for the war is fallacious. There pends in the Federal Trial Courts numerous cases wherein litigants contend for overtime against "cost-plus-a-fixed-fee" contractors. These cases demand the special attention of this Honorable Court to the ascertainment of whether such employees occupy a different position, provided they are working upon lethal and deadly munitions of war, rather than upon ordinary but necessary instruments of war. We respectfully refer this Honorable Court to numerous cases illustrative of the points herein urged.

Umthen v. Day & Zimmerman, Inc., 16 N. W. (2d) 258;

Timberlake v. Day & Zimmerman, Inc., 49 F. Supp. 28;

Lasater v. Hercules Powder Co., 7 W. H. Cases 150;

Adams v. St. Johns River Shipbuilding Co., 69 F. Supp. 989;

Barksdale v. Ford, Baker & Davis, 70 F. Supp. 690;

Deal & Co. v. Leonard, 196 S. W. (2d) 991;

Steward v. Kaiser Co., 71 F. Supp. 551;

Anderson v. Federal Cartridge Corp., 7 W. H. Cases 1;

Matlock v. Sanderson & Porter, 6 Wage Hour Report 917;

Crabb v. Welden Bros., 65 F. Supp. 369.

No more far-reaching decision might or would affect more people directly engaged in the occupation and production of war materials than this decision. We are unable to distinguish between those employees such as your petitioners and the numerous and overwhelming number of employees similarly engaged who may and will have had the benefit of the Fair Labor Standards Act.

2. Every "cost-plus-a-fixed-fee" contract entered into with the Government by a private contractor has certain aspects of control. However, every such contract has specific provisions with reference to the compliance with employment, sanitation, health and wage and hour laws of the State and Federal Governments. It seems clear that "cost-plus-a-fixed-fee" contractors are not agents or instrumentalities of the United States Government, but instead are independent contractors.

Alabama v. King & Boozer, 310 U. S. 1;
Buckstaff Co. v. McKinley, 308 U. S. 358;
Curry v. United States, 314 U. S. 14;
Penn Dairies v. Milk Control Commission, 318 U. S. 361.

We herewith refer to the contract between the Government and your respondent, being Exhibit "A" of your respondent's motion for a summary judgment, which clearly calls for independent management service, including the sub-contracting and many services of construction and in-

stallation of equipment and, in fact, the operation of the entire ordnance facility. We are unable to ascertain any difference between the contract between your respondent and the Government and any other "cost-plus" contract with the exception of the provision wherein the Government assumes liability by virtue of the dangerous and hazardous occupation in which your respondent was engaged in manufacturing, processing and assembling explosives. The contract clearly points out that but for the assumption of such risks the contractors could not have been engaged, the work being particularly hazardous, and fraught with a danger of great loss. The explanation of the insertion of this provision is clear on page 31 of the contract, being Title VII (a), Sections 1 and 2. We do not believe that the insertion of this provision changes the status of your respondent insofar as the applicability of the Wage and Hour Law to your petitioners is concerned.

Your petitioners were employees of your respondent; your petitioners were continuously engaged in working upon materials imported into the State of Texas, and in the manufacture of products within the State of Texas, and in the continuous exportation of the finished products outside of the State of Texas. To hold that such employees as your petitioners were not engaged in "commerce" within the meaning of the Fair Labor Standards Act, is an arbitrary exclusion of your petitioners from the operation of the Act, which is not provided within the Act, and no apparent basis exists for any exception or exclusion of your petitioners from the Act.

No basis in fact and no language within the statute authorizes the exclusion of the finished products, including the fertilizer made by your respondent on the plant facilities within the State of Texas, from the term "goods" as defined in the Fair Labor Standards Act. Your petitioners were simply engaged in employment by a "cost-plus-a-fixed-fee" contractor, just as hundreds of thousands of other American citizens and employees were so engaged during the war; all of whom were subject to the express provisions of the Fair Labor Standards Act.

National Labor Relations Board v. Carroll, 120 F. (2d) 457 (C. C. A. 1.);

Thompson v. Daugherty, 40 F. Supp. 279 (D. Md.);

Magann v. Long's Baggage Transfer Co., 39 F. Supp. 742 (W. D. Va.);

Adams v. St. Johns River Shipbuilding Co., 69 F. Supp. 989 (S. D. Fla.);

Cf. National Labor Relations Board v. E. C. Atkins & Co., 67 S. Ct. 1265;

National Labor Relations Board v. Jones & Laughlin Steel Corp., 67 S. Ct. 1274.

The numerous decisions previously referred to, which held Government contractors subject to the provisions of the Fair Labor Standards Act, presumably assumed that the employees were not employees of the United States. In the *Carroll case* the employees were required by the contract to take the oath of the Post Office, to furnish bond for faithful performance, to meet age and education qualifications, to wear standardized caps or badges and to

load and unload mail under direction of representatives of the Post Office Department. The contractor was also required to suspend employees for inefficiency or delinquency and his vehicles were under the control of the postmaster and operated under fixed schedule. The Court of Appeals nevertheless held "that the respondent is an independent contractor and that the truck drivers hired by him are his employees and not employees of the United States." *120 F. (2d) at 458.* To the same effect see *Fleming v. Gregory, supra.* The facts here warrant the same conclusion with the result that Section 3 (d) has no application.

3. We believe that the "ultimate consumer" exclusion under the Fair Labor Standards Act was intended solely to protect the purchasing consumer who intended to appropriate the goods to his own use and benefit, and could not conceivably have meant the use of the goods by the United States Government in the prosecution of the war such as has just been determined. The restrictive definition of goods so far as it excepts the "ultimate consumer" was intended not to excuse the United States Government or any producer of goods, or your respondent, a "cost-plus-a-fixed-fee" contractor, but to excuse an innocent, unsuspecting private individual who carried with him personal articles produced in violation of the statute from one state to another. The only purpose of the "ultimate consumer" provision of the Fair Labor Standards Act was to exempt such private individual as the ultimate pur-

chaser from any criminal liability for interstate transportation of such goods as he might engage in. The "ultimate consumer" clause was not intended to limit the scope of the Act as to any producer of goods intended for shipment in interstate commerce.

Chapman v. Home Ice Co., 136 F. (2d) 353, 355 (C. C. A. 6), certiorari denied, 320 U. S. 761;

Similarly, in *Hamlet Ice Co. v. Fleming, 127 F. (2d) 165, 170, 171 (C. C. A. 4), certiorari denied, 317 U. S. 634.*

4. There is almost conclusive evidence that Congress intended the Act to apply to goods produced for transportation by the United States to be found in the subsequent legislative history in which Congress recognized that the Fair Labor Standards Act applies to workers employed in plants producing armaments and other vital war materials for the Government. Both the offer and the rejection of various amendments designed to exempt such workers from the Act were predicated on the premise that they were within the existing coverage provisions. Some eighteen bills were introduced for the purpose of suspending or restricting the overtime provisions of the Act for the war's duration. Such amendments would have been largely unnecessary had the existing Act not applied to workers producing war goods for the Government. By their rejection Congress clearly indicated its desire that the Act continue to be applied to employees engaged in these activities.

Cf. Apex Hosiery Co. v. Leader, 310 U. S. 469; United States v. Delaware & Hudson Co., 213 U. S. 366, 414; Alabama v. King & Boozer, supra. Furthermore, any possible doubt as to the applicability of the Fair Labor Standards Act to employees of "cost-plus-a-fixed-fee" contractors with the Government is removed by the enactment of the Portal-to-Portal Act of 1947, Public Law 49, 80th Congress, Chap. 52, 1st Session, Section 1 (a) (9) of the Portal Act contains the Congressional finding that if certain liabilities under the Fair Labor Standards Act were permitted to stand, "the cost to the Government of goods and services heretofore purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts." The Committee Reports of both Houses of Congress referred to the added cost to the Government by virtue of liabilities to "cost-plus" contractors if the Portal-to-Portal suits by employees were successfully prosecuted. See S. Rept. 48 (Calendar No. 44) 80th Congress, 1st Session, pp. 32-39, and H. Rept. 71, 80th Congress, 1st Session, pp. 4-6. Accordingly, we see that Congress, both during and after the war, never doubted that the Act covers employees of "cost-plus" contractors with the Government who were engaged in the production of munitions of war and by the Portal Act indicated the full extent to which it believed the liability of the Government and others should be limited.

We believe the petition should be granted and the case reversed.

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